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7 UNITED STATES DISTRICT COURT  
8 DISTRICT OF NEVADA

9 MICHAEL J. CONLON, ) CV-N-01-0700-DWH-VPC  
10 Plaintiff, ) REPLY MEMORANDUM IN FURTHER  
11 v. ) SUPPORT OF DEFENDANTS'  
12 UNITED STATES OF AMERICA, ) RENEWED MOTION TO DISMISS  
13 Defendants. ) OR, IN THE ALTERNATIVE, FOR  
SUMMARY JUDGMENT

14 Comes now the United States of America, through its undersigned counsel, and submits  
15 its reply memorandum in further support of its renewed motion to dismiss or for summary  
16 judgment (#62).

17 As noted in the United States' renewed motion, the only defendant remaining in this case  
18 is the United States and the only claim remaining is an action under the Federal Tort Claims  
19 Act (FTCA). See Stipulation for Dismissal, etc. (#53). The United States previously sought  
20 dismissal of the FTCA claim on the grounds that such claim was barred by the statute of  
21 limitations and also sought, alternatively, summary judgment (#44). No disposition of that  
22 motion was made due to an effort by the parties to schedule another settlement conference. That  
23 effort having failed due to plaintiff's failure to appear for the settlement conference,<sup>1</sup> the United  
24 States renewed its previous motion to dismiss or for summary judgment.

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26  
27 <sup>1</sup> Although plaintiff has requested several settlement conferences and such  
28 conferences have been scheduled, plaintiff has failed to appear for any such conference.

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1 Plaintiff opposes the renewed motion, arguing that the statute of limitations does not bar  
 2 the FTCA action and further arguing that summary judgment is precluded by unspecified  
 3 material issues of fact. As discussed below, plaintiff's opposition betrays a fundamental  
 4 misunderstanding of the claim which is made against the United States under the FTCA.

5

6 1. Statute of Limitations

7 In its renewed motion for dismissal, the United States argued that plaintiff's FTCA claim  
 8 for false arrest accrued in February 1998 (when he was arrested) and that his July 1991  
 9 administrative claim was untimely (beyond the two-year limitations period). In response,  
 10 plaintiff argues that "a § 1983 cause of action for damages attributable to an unconstitutional  
 11 conviction or sentence does not accrue until the conviction or sentence has been invalidated." See  
 12 Opposition memorandum, p.2, lines 27-ff. Plaintiff cites Heck v. Humphrey, 512 U.S. 477  
 13 (1994) to support his statement concerning the accrual of a cause of action under 42 U.S.C.,  
 14 section 1983. Plaintiff offers no other analysis concerning the United States' statute of  
 15 limitations defense.

16 The difficulty with plaintiff's "analysis" is that this is not an action under § 1983, has  
 17 never been an action under § 1983, and can not be construed as an action under § 1983.  
 18 Accordingly, there is no basis to evaluate the accrual of plaintiff's FTCA cause of action using  
 19 principles applicable to § 1983 actions.

20 The second amended complaint (#42) makes no mention of a claim under 42 U.S.C.,  
 21 section 1983. Moreover, even if a § 1983 claim had been alleged (which it was not), all claims  
 22 other than an FTCA claim for false arrest against the United States were dismissed upon  
 23 stipulation of the parties approved by the Court (#53). Moreover, no § 1983 claim can be  
 24 asserted against the United States (or its agencies and employees) because § 1983, by its terms,  
 25 imposes liability only against persons acting under color of state law. FDIC v. Meyers, 510 U.S.  
 26 471 (1994); Daly-Murphy v. Winston, 837 F.2d 348 (9<sup>th</sup> Cir. 1984); see also Gomez v. Toledo,  
 27 446 U.S. 635 (1980). There is, accordingly, no conceivable basis for the suggestion that a

1 section 1983 claim is pending in this action against the United States. There being no section  
2 1983 claim pending in this action, plaintiff's discussion of the statute of limitations analysis  
3 pertinent to a section 1983 claim is wholly inapplicable to the United States' motion.

Nor does plaintiff's section 1983 analysis apply by analogy to this FTCA claim for false arrest (and plaintiff does not argue in favor of such an analogy). In Heck v. Humphrey, *id.*, the question before the Supreme court was whether a claim for money damages arising out of an unlawful conviction could be pursued under section 1983. Heck, 512 U.S. at 480, fn.2. The Supreme Court analogized the wrongful conviction claim to a malicious prosecution claim and explicitly differentiated it from a false arrest claim or false imprisonment claim. *Id.*, 512 U.S. at 484. The Supreme Court held that a § 1983 claim for damages arising out of an allegedly unconstitutional conviction or imprisonment, or for other harm cause by actions whose unlawfulness would render a conviction or sentence invalid , a plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determinations, or called into question by a federal court's issuance of a writ of habeas corpus. *Id.*, 512 U.S. at 486-87.

16 The Heck analysis is inapplicable to this case because plaintiff's claim under the FTCA is  
17 for false arrest, not for malicious prosecution or for acts whose unlawfulness would render the  
18 imprisonment invalid. Rather, plaintiff's claim arises out of an alleged error in the computation  
19 of a parole period under the "old" parole system, a computation which resulted in the issuance of  
20 an arrest warrant and plaintiff's arrest in February 1998 when he violated the terms of his parole.  
21 Plaintiff's "false arrest" claim under the FTCA accrued at that time rather than when plaintiff  
22 was released in August 2001 because all of the events which resulted in his "false" arrest  
23 occurred on or before the date of his arrest.<sup>2</sup>

1 For the foregoing reasons, this FTCA action against the United States must be dismissed  
2 because plaintiff failed to file a timely administrative tort claim, a jurisdictional requirement  
3 under the FTCA.

4

5 2. Alternatively, Summary Judgment Should Be Granted

6 In opposition to the United States' alternative motion for summary judgment, plaintiff  
7 argues that a fact issue remains concerning "the extent to which Plaintiff's parole hearings were  
8 conducted in good faith." See Opposition memorandum, p.3. Plaintiff fails, however, to submit  
9 any affidavits or other evidentiary materials which would support a finding favorable to plaintiff.  
10 It is wholly inadequate to simply "argue" the existence of various abstract "facts" to oppose an  
11 otherwise factually-supported motion for summary judgment.

12 There is no evidentiary support for a finding of negligence against the United States in  
13 this FTCA action. Plaintiff contends that he was incarcerated "too long" because his parole  
14 status was improperly evaluated by the U.S. Parole Commission (which issued the arrest  
15 warrant). The dispute concerning the Parole Commission's evaluation of plaintiff's parole status  
16 was a legal dispute which eventually was adjudicated favorably to plaintiff in habeas corpus  
17 proceedings in the District of Arizona, when that court accepted plaintiff's legal position as  
18 correct and ordered plaintiff released from custody. That finding, however, does not  
19 automatically provide a viable claim for damages under the FTCA.

20 Accordingly, summary judgment should be entered against plaintiff and in favor of the  
21 United States regarding the only claim which remains in this litigation, the claim for false arrest  
22 under the FTCA.

23 Respectfully submitted,

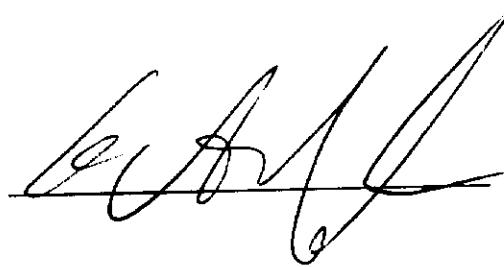
24 DANIEL G. BOGDEN  
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28 GREG ADDINGTON  
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1 CERTIFICATE OF SERVICE  
2  
3  
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5 I certify that a copy of the foregoing REPLY MEMORANDUM IN FURTHER  
6 SUPPORT OF DEFENDANTS' RENEWED MOTION TO DISMISS OR, IN THE  
7 ALTERNATIVE, FOR SUMMARY JUDGMENT was mailed by first-class mail, postage pre-  
8 paid, on March 11, 2004:  
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3/12/2004

**Submission Memo**

Case Number	Caption				Date Filed	Nat/Suit
	CR-N-98-0148 - HDM - PHA USA VS Robert H. Cosby				WAYNE JULIAN	08/05/1999
Sub Date	Doc	Judge	Type Status	Age	Document Type Document Name	Description
03/20/2004	105	DW	Due Not Comp	8	MINUTES OF PROCEEDINGS HEARING	Revoc Hearing cont to 3/16/04 2pm.
05/01/2004	103	HDM	Due Not Comp	22	SUMMONS ISSUED	chk status of summons issd re doc #102 as to Cosby
10/10/2004	102	HDM	Due Not Comp	23	ORDER PETITION	chk status of pet revoke spvsd rels
02/27/2006	96		Due Not Comp	379	ORDER	ck for retn of exibits.
03/12/2004	104	HDM	Sub Sub	9	MEMORANDUM	memo in spt of #102 obo Govt; #106-suppl; #107-oppo; reply due

**COMMENTS**


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